COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-09849

BARNSTABLE COUNTY

DANIEL PRUNTY
Appellant

v

COMMONWEALTH OF MASSACHUSETTS
Appellee

BRIEF
COMMONWEALTH/APPELLEE

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Appellee

ON APPEAL FROM A JUDGEMENT
IN THE BARNSTABLE SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

ISSUES PRESENTED

I. Did the trial court correctly deny as mere sham the defendant's use of a peremptory challenge when attempting to strike the only African-American juror who would sit on the jury?

II. Was the trial court's instruction regarding prior inconsistent statements and witness credibility adequate?

III. Is a new trial required under M.G.L. Ch. 278 § 33E?

STATEMENT OF THE CASE

On August 31, 2004, a Barnstable County Grand Jury indicted Daniel Prunty on charges of first-degree murder, assault and battery with a dangerous weapon, and attempted extortion.

A trial by jury began on February 7, 2006 in the Barnstable Superior Court before Nickerson, J. On February 16, 2006, the jury delivered guilty verdicts on all counts. The trial court subsequently sentenced the defendant to life imprisonment, without the possibility of parole, on the first-degree murder conviction, to 12-15 years in state prison on the conviction for attempted extortion, and to 7-10 years in state prison on the assault and battery with a dangerous weapon conviction to be served concurrently with the attempted extortion charge.

The defendant filed a timely notice of appeal from his convictions on March 8, 2006.

STATEMENT OF FACTS

The Murder of Jason Wells

In the afternoon hours of August 7, 2004, Daniel Prunty, while in his home at 6 Palomino Way, in Sandwich Massachusetts pointed a gun to the head of the victim, Jason Wells, and pulled the trigger firing one round into the victim's head inflicting a lethal wound. (Tr. 142, 144, 146-7, 151, 155, 207, 211, 282, 318, 333, 338, 373-377, 412-416)

The evening prior to the shooting, the defendant and several other individuals, including the victim, were at the defendant's house using cocaine all night. (Tr. 326, 403-04)

Sometime during the day on August 7, 2004, the defendant accused the victim of stealing money, watches, and jewelry items. (Tr. 328)

Several of the individuals who were at the house the evening before, left Prunty's house during the day of August 7, 2004. (Tr. 328). One of the individuals, Rebecca Pape, received a telephone call from Prunty, which resulted in her return to the house with Christopher Rose, Mark Rosa and Michaela Davenport. (Tr. 327). Upon return to the house a big fight ensued. (Tr. 329)

Rebecca Pape, at the time, was a heroin addict. (Tr. 401) The defendant would usually supply it or buy it for her. (Tr. 402) Pape would clean Prunty's house and do other jobs for him. (Tr. 402) During the week leading up to August, 6, 2004, Pape and the victim stole money and jewelry from Prunty. (Tr. 403) Pape stole money and the victim stole jewelry. (Tr. 403) The victim also had an apparent drug problem (Tr. 403)

Prunty and Pape both used heroin and cocaine on August, 6, 2004. (Tr. 404) At some point on August 7, 2004, Pape left Prunty's house to pick up Chris Rose, an ex-boyfriend. (Tr. 405) In the car were Michaela Davenport, Christopher Rose, Mark Rosa and Rebecca Pape. (Tr. 406)

Prunty, the victim, and Richard Ford used cocaine in the 6 Palomino house on August 7, 2004, the first time they smoked it

and second time they sniffed it. (Tr. 542) It was at that time that Prunty called Rebecca Pape on a cellular phone. (Tr. 406, 408, 543) Prunty told Pape that "You know, how you took my stuff... and I want all my stuff back." (Tr. 543) Prunty was agitated as he was missing money and jewelry. (Tr. 406) The group in Pape's car drove to Prunty's house. (Tr. 407)

When they arrived at Prunty's house there was arguing going on inside the house between Prunty and the victim. (Tr. 407) The argument lasted for some time. (Tr. 407)

The victim then went into the dining room and sat down and the defendant went upstairs and retrieved a gun and returned to the first floor. (Tr. 407-08) Prunty then put the gun to the head of the victim and cocked it. (Tr. 412, 601) The magazine had bullets in it and Prunty then loaded the weapon. (Tr. 601-03) The defendant said to the victim "If you don't get my stuff by sunrise, you'll never see another sunrise again." (Tr. 412)

The victim began to cry and Chris Rose pushed the gun away from the victim's head and he began to console the victim. (Tr. 412-13) The victim, Prunty, Chris Rose and Rebecca Pape then went into the kitchen. (Tr. 413) Jason began to make phone calls to get the stolen "stuff" back. (Tr. 414, 417) Jason could not contact anyone, Chris Rose was in a dining area near the kitchen, and Pape walked down the hallway. (Tr. 414-15)

There was still some arguing going on, Pape turned to come back up the hallway when she saw Prunty with the gun. (Tr. 415) Prunty was pointing the gun at the victim's head. (Tr. 415) The defendant said "Fuck it" and the gun went off. (Tr. 415-17) The victim then fell to the floor in the kitchen. (Tr. 416)

Richard Ford was in the basement while the argument was happening. (Tr. 554-56) Ford could hear arguing and the victim crying at one point. (Tr. 555) Ford also heard Prunty say to the victim "You're my friend. How could you do it? You stole from me." (Tr. 555) The victim said to Prunty that he was sorry. (Tr. 555-56) Prunty then said "How could you steal my shit? I should kill you." (Tr. 556) Five seconds later, Ford heard a gunshot and then a loud thud. (Tr. 556-57) Ford went to the top of the stairs from the basement and saw the victim lying in the kitchen and Prunty was right above him. (Tr. 557-58)

Before the shooting, Christopher Rose also intervened on behalf of the victim (Tr. 600-02) He told Prunty to "Put that thing away." (Tr. 600) Rose then walked to a small area off the kitchen. (Tr. 611) Rose saw Prunty holding the gun towards Jason and then heard a shot. (Tr. 611)

Pape began to panic. (Tr. 416) The defendant then said to Pape that he (Prunty) was in the bathroom with Pape and that Jason had killed himself. (Tr. 416)

Pape and Rose could see a wound on the victim' forehead. (Tr. 418-19, 611-12) Chris Rose was yelling "He blew his head off. He blew his head off." (Tr. 418)

Pape was later interviewed by the police several times. Each time she indicated that the defendant was in the bathroom with her at the time of the shooting. (Tr. 424-26) However, she admitted on direct examination that she lied to police. (Tr. 424-25)

Pape also testified at trial that she and Prunty had spoken several times to "get a story straight." (Tr. 428) When asked why she was covering for Prunty, Pape stated "cause Dan supplied me with everything I needed. He gave me money. He gave me drugs. He gave me my cigarettes. He did everything for me. He bought me a leather coat, jewelry. And without him, without me having him around, I had nothing. And I was going to be sick." (Tr. 430-31)

Sandwich, MA police responded to 6 Palomino Way after a call to 911 was made reporting a shooting. (Tr. 134) Officer D. Byrne and Sgt. J. Cotter of the Sandwich Police Department arrived at the scene. (Tr. 140) The defendant was one of two men met the police officers outside of the 6 Palomino address. (Tr. 140-41) Prunty told an officer that someone "shot himself." (Tr. 141)

The police went into the house and identified the victim lying on the kitchen floor with a wound to his forehead which was bleeding. (Tr. 142)

Officer Byrne then checked the victim's vital signs. (Tr. 142) Officer Byrne detected a pulse, then Sgt. Cotter went to retrieve emergency gear from one of the police' cruisers. (Tr. 142) Sgt. Cotter then observed a weapon behind Officer. (Tr. 142) Officer Byrne then secured the weapon, a Ruger .22 caliber rifle. (Tr. 143-44) Rescue workers arrived and began working on the victim. (Tr. 147, 150)

Police continued to secure the house and Prunty told Officer Byrne that the victim was a heroin addict. (Tr. 151) Prunty told police he went downstairs with the rifle just to threaten the victim in order to make him give his property back. (Tr. 152) One spent shell casing was found in a pool of blood when the victim was removed from the house. (Tr. 155) Prunty then told officers that he was talking to Rebecca Pape at the end of the hallway when the shot went off. (Tr. 157-58) Once this information was conveyed to Sgt. Cotter, Prunty was placed under arrest and transported to Sandwich Police Department. (Tr. 159)

At that point the victim was still alive. (Tr. 159-60) A lieutenant firefighter and paramedic, Peter Pozerski, of Sandwich Fire Department arrived on the scene with two other

crew members. (Tr. 332) Pozerski observed the victim on the floor of the kitchen with an injury consistent with a gunshot wound. (Tr. 333-34) The victim was breathing but unresponsive. (Tr. 334) The victim was med-flighted to Boston. (Tr. Tr. 335-36) When he arrived at a Boston area hospital, he was pronounced dead. (Tr. 338)

Prunty was interviewed by Trooper John Kotfila of the Massachusetts State Police. Prunty denied shooting the victim, but relayed the story regarding the theft of his items by the victim. (Tr. 711-15) Prunty told Kotfila that: "This nigger came up from Hyannis and ripped me off." (Tr. 711-722)

An autopsy of the victim was done at the Massachusetts Medical Examiner's office in Boston. (Tr. 371-80) The medical examiner opined that the gun was inches from the victim's head when it was fired. (Tr. 377) And the cause of death was determined to be a rifle gunshot wound to the head. (Tr. 385)

The Impanelment of Juror 16 (Venire Juror 8-8)[1]

The venire was assembled on February 7, 2006 in Barnstable Superior Court. (Tr. 6) The impanelment process involved an individual *voir dire* and was unremarkable in most respects. (Tr. 6-98) The final (16th) juror seated (Venire Juror 8-8) was called

[1] Venire Juror 8-8 was ultimately seated as Juror 16. The Commonwealth, when using the title Juror 8-8, Venire Juror 8-8, or Juror 16, is always referencing the same person.

to side bar to answer a question asked of all jurors selected in the case. (Tr. 82) The trial court inquired of the juror:

> The Court -- In this matter, sir, the Defendant is white, the deceased was black; the witnesses may be of different races or ethnic heritage. Does this information about race and ethnic heritage affect your ability to be fair and impartial as a juror?
>
> Juror -- No. (Tr. 82)

The juror was then asked to step back with the court officer and the court found the juror indifferent. (Tr. 82) The Commonwealth indicated it was satisfied with the juror and defense counsel immediately said "I'm looking to exclude the juror." (Tr. 82)

The Commonwealth objected. (Tr. 82) When probed as to the basis of the Commonwealth's objection, the prosecutor stated "I just - just on the idea that he - I think he's the only African American potential juror that we've had on this panel; on that basis, I'm objecting. Or at least the first African American that I've seen that was going to be seated." (Tr. 83)

The court responded:

> There is no pattern at this stage for -- I cannot think in my mind of any other black American who was called to serve in the impanelment process up to this point, nor did I note anyone who by physical appearance at least would appear to claim Cape Verdean heritage or Carribean American heritage, a similar heritage.
>
> However, if my memory is right as to case law, I believe even a challenge of one can form a basis for a

questionable challenge. I have reviewed the gentleman's slip, juror slip; and there is no reason for challenge that is immediately apparent from the juror slip as to his location, as to his employment, as to his spouse's employment and so forth.

All things considered, I do think that the Commonwealth has met the requirement of a prima facie showing of impropriety. Therefore, I would return to the challenging party to determine whether there's a good reason for exercising the challenge. Do you have a clear and reasonably specific explanation, counsel? (Tr. 83-84)

The remainder of Juror 8-8's *voir dire* transcript reveals the process followed by the trial court:

Counsel -- If I can first start with the foundational requirement, Your Honor? I believe that under Duran versus Missouri; and the Commonwealth, it's Commonwealth versus Soares, I think the Commonwealth has to show more in the way of a pattern.

There have been two jurors that I would say are of color so far that have come before this Court. The first one, I think, is seated. His name was (name redacted). He appears to me maybe - maybe an Italian name. At the risk -

The Court -- The young man?

Counsel -- Yes, the second - the second juror seated. I think he's in Seat No. 2.

The Court - Certainly by physical appearance, I wouldn't characterize him as African American or black.

Counsel - No, I characterize him, however, as light Hispanic. So, insofar as any sort of systematic exclusion of races here, we've only had two that have come before the Court; and I agreed to seat one of them.

The Court - All right. I must say I have a clear picture in my mind of (name redacted) as he stood there, and partly because he was so young. And I don't see how one could suggest even remotely that the

gentleman is in any way similar to the situation before the Court now.

At best, I think that (name redacted) could be fairly said to have perhaps had Mediterranean ancestry based on physical appearance. And let's face it. As we talk about physical appearance, that's a rather crude classification system; but that's what we're left with at the moment. So -

Counsel - Well, that's not why I was including him; and that's certainly not why I'm looking to exclude -

The Court - What I'm saying is I don't see him as being a minority group quite frankly.

Counsel - Well, if he's Hispanic decent (sic), then he is part of a minority group.

The Court -- What gives you reason to say he's Hispanic?

Counsel - Skin color, hair color, just general appearances. I guess one of those things that's somewhat -

The Court - I must say I don't see it. But go ahead counsel.

Counsel - It's a physical appearance that seems to be light Hispanic.

The Court - I don't see it counsel; but go ahead.

Counsel - In any event, I'm not sure under the - under Duran versus Missouri or Soares, the government has met its burden. Nevertheless, to articulate further, this gentleman is a - is a school teacher with young children.

Some of the people who are going to testify in this case were a relatively young age. They were in their early 20's. They were associated with drugs. They - it appears that one of them at least and perhaps a couple of them, actually three of them - I think the victim, Mr. Rose and Miss Pape had somewhat of a troubled history that's reflected during their course of telephone conversations that were recorded.

That history affects how far they went in school and what they did in school. I'm informed that some of the towns down on the Cape - I don't know in particular Barnstable public schools, but certainly I'm told the Sandwich public schools, Hyannis public schools have unfortunately been impacted rather heavily - most recently the Sandwich public schools by alcohol and drug abuse. I feel like this particular type of juror would not be able to sit impartially on a case like this.

As a result of his occupation, I also bring to the Court's attention that he doesn't bring a lot of diverse experience with him in terms of who his spouse is. It appears she is an administrator, also with the Barnstable public schools. I interpret that to be perhaps a principal or vice-principal. Typically they promote or advance to that position from a teaching position.

So, they have very, very similar background in that regard. And I feel that he would not sit fairly in judgment of my client on a case like this.

The Court - Commonwealth, do you wish to be heard?

Prosecutor - Just the only thing I would say, Judge, is on its face, on the face of this sheet the juror filled out, there is nothing, I would suggest, that he's anything other than a fair and impartial juror. But I restate my objection. As the only African American that was going to be seated on this panel, there was a move to exclude him. That's all.

The Court - Thank you. With regard to jurors who are already seated, there are two jurors, 5-6 and 4-3 who are retired teachers, one for a town school system. The other one did not specify what level they taught.

Also with regard to jurors already seated, Juror 3-8 is a teacher who has minor children, ages two and six. In addition, Jurors 1-4, 3-6, 8-2 - while these three jurors are not teachers, they all have very young children, children under the age of 10 at home.

The Court has reviewed the case of Commonwealth versus Curtis (sic), 424 Mass. 78 and has taken the teachings of Curtis into consideration as well. Based on everything before me at the moment, counsel, I must say respectfully that the proffered reason for a challenge is not bona fide, but rather is a mere sham.

Is there anything else you would like to tell me about this fellow before we close the matter?

Counsel - Well sure. The other problem is that I - Mr. Welsh (the prosecutor) has several people coming in from various jails, almost all of whom have claimed that my client is a racist. Many of these people are black themselves.

I don't know if they're all from African American descent, but they make the claim that - that my client used the word "nigger" on multiple occasions; that he used the word in connection with the killing of Jason Wells.

There is also a report that says my client refers to black people as "moon pies." I think comments like that certainly are going to perhaps get under the skin of somebody who might be a little bit more sensitive to that issue, particularly where that is their descent.

First of all, we do take exception to the fact that these were said in the first place; but nevertheless, if the jury chooses to believe that they were made by my client, certainly someone who may be sensitive to that because of who they are may tend to be prejudiced by the comments.

The Court - I gather that whether these matters were said or were not is contested then?

Counsel -- Well, they're going to be - they're going to be contested in the court.

The Court - Your client doesn't admit making these statements, I gather?

Counsel - No.

The Court - All right.

Counsel - He never admits making those statements. Some of the - there are several witnesses who say that he makes those statements in several different contexts. Some of it is repetition of what Chris Rose may have said at the crime scene.

There's a dispute as to whether or not Mr. Prunty said, the nigger killed himself, or Chris Rose said, [T]he nigger killed himself. And each - by some of the

police reports, each one attributes the statement to the other.

The more - well, as if that statement isn't bad enough in and of itself, the more racial statements that involve additional slurs come from inmates in the Barnstable House of Correction and the Plymouth County House of Correction.

The Court - Commonwealth, what do you say with regard to this added reason for the challenge? Or anything else that the Court said so far?

Prosecutor - With respect to the reason that Mr. Neyman just articulated, I would suggest if he's - first of all, he's not even accepting the statements as being made from his client. So, that's for him to cross examine or raise doubts amongst the jurors as to whether the statements were actually made. But I think beyond that, if he - if a jury were to find he made these statements, then he made them; and they're to have whatever weight and impact on a jury that they should appropriately have. So, beyond that, I really don't have any further comment.

The Court - All right. Let's bring the juror back in for a moment. I would like to pose another question to the juror.

Counsel - Your Honor, could one of the questions be what age kids he is involved with at the public schools? All the other teachers were a younger age.

The Court - I'm sorry?

Counsel - One of the - one of the questions, if it could pertain to the age of his students.

The Court - (Juror 8-8), good afternoon. Thank you for your patience, sir. What grade level do you teach at, please?

Juror - Right now, I have ninth and tenth graders.

The Court - I see. And so you're at the high school?

Juror - Yes.

The Court -- Teaching what subjects?

Juror - History. This is my first year at the high school. I did my previous ten years at the middle school.

The Court - Ten years?

Juror - Yes.

The Court - Okay.

Juror - Seventh and eighth graders.

The Court - In the course of this case, (Juror 8-8), there may be evidence brought forward where somebody involved in the case whose credibility may or may not be an issue in the case is said to have made racist comments.

Whether that person did or didn't make those comments may well be a factual issue. In other words, determining credibility.

Juror - Uh huh.

The Court - And I want to be very sensitive to your situation, (Juror 8-8). If someone in the course of the evidence is accused of making racist statements, would that in any way cloud your ability to sort out issues of credibility? Who is telling the truth, who isn't? And then acting on the evidence as you find it to be?

Juror - Wow.

The Court - Yeah, wow.

Juror - I mean, as a teacher, I've been able to, you know, separate things anyway. So, I think I would be able to do that.

The Court - All right. Thank you, sir. You may step back outside.

The Court - Yes, something else you would like to say, counsel?

Counsel - Well, I mean, at this point, rather tha[n] beating around the bush, I would much rather have the Court then attribute it to my client or let the prospective juror know that these remarks are going to be attributed to my client rather than other witnesses.

Because I think there is a big difference in terms of weighing the issue of my client's culpability or evaluating the credibility of witnesses based on allegations of racism. And they're strong in this case. They really are.

The Court - Well, you saw the gentleman's reaction, just as I did now. And I must say, I - from my own eyes, I can't imagine a more straightforward, honest response from a man.

He sort of rocked back on his heels and said, Wow, as he thought about the question and tried to parse it into its various subparts; and then after he thought about it for a minute, he came forward with a very solid, very genuine explanation in my eyes at least, a very well thought out explanation given the limited amount of time the man had to ponder the question.

There's another factor that concerns me; and that is, as we examine your most recent concern about racist comments in the testimony - if that were a genuine concern, then why wouldn't juror in Seat No. 2, who you say is Hispanic, be equally sensitive to racist type comments?

Wouldn't someone of Hispanic heritage possibly have faced the same types of discrimination, the same types of alienation? And, therefore, would be challenged, I would assume, by you early on. If, indeed, this person were Hispanic.

Now, I'm not in any way suggesting this person appears to be Hispanic. And if - according to that analysis, why didn't you challenge him?

Counsel - There is nothing - there's no racist comments that my client makes about Spanish people, first off. Second off, the victim is not Spanish. He was black. So - and the reference is hideous; that the nigger killed himself, or there's talk about - from one of witnesses (sic), Well, the nigger deserved to die anyway.

Those are absolutely hideous remarks that under any circumstances are going to send chills down the spines of jurors. Now -

The Court - Do you want me to address that comment directly to (Juror 8-8) and asking if he can be fair and impartial under those circumstances?

Counsel -- Absolutely. If there is attributions that will be made to my client referring to this person as, The nigger deserved to die anyway, several other comments about my -- attributed to my client using the word nigger, and references to black people as moon pies. And the other one escapes me. Moon pies I recall because I never heard it before.

The Court -- you want me to bring (the juror) back in and put it right to him as you put it to me?

Counsel -- Absolutely. It's coming out anyway.

The Court -- All right. Commonwealth, what do you say?

Prosecutor -- I was just looking through my notebook, Your Honor, to try and see what exactly was attributed to him. There is -- there is a reference to -- that I think will be coming into evidence to, Tell the cops that the nigger shot himself.

But I - I can't find the other -- whatever other reference counsel is referring to. But whatever inquiry the Court deems appropriate, I'm certainly willing to live by.

The Court -- All right. Let's bring (Juror) back in, please.

Counsel -- Judge, the other reference I just -- was porch monkey. So, those are the three different, you know --

The Court -- (Juror 8-8), thank you again your patience, sir. When you came in a few moments ago, I spoke about how there may be some testimony from witnesses that could be taken as racist comments. I want to be more direct in this regard.

In this case, there will be comments attributed to the Defendant by other witnesses that he says

things to the effect that, That nigger was going to die anyway or -- the exact language, gentlemen?

Prosecutor --I think one of the comments attributed is that, The nigger shot himself.

The Court -- That the nigger shot himself. There may also be comments attributed to the Defendant referencing black people as porch monkeys or --

Counsel -- I believe the expression that will be used is moon pies.

The Court -- Moon pie. Now, to these various comments, the Defendant has disavowed them, has denied them. But still, that type of evidence is apt to come in. And I want to be as sensitive as I can to your concerns and to everyone's concern for a fair trial.
Would you be able to set aside the shock value, if you will, or the shock affect (sic) of such racist statements --

Juror - Uh huh.

The Court -- and proceed to judge this case strictly on its merits and the credibility of the evidence as you determine it to be?

Juror -- I mean, I've been called quite a few of those in my lifetime anyway. So --

The Court -- and you can't go forward and be a fair and impartial juror under the circumstances that I have outlined?

Juror -- i would be able to do my best on it.

The Court -- All right. Thank you, sir.

Juror -- Okay.

The juror was then asked to step outside with the court officer.

The Court -- The Court finds there to be no cause for challenge of this juror. The court finds this juror to be fair and impartial. The court finds that the

challenge is mere sham. For all of those reasons, the gentleman will be seated as Juror 16.

Counsel -- my objection, for the record, please, Your Honor. (Tr. 82-96)

ARGUMENT

I. THE ATTEMPTED PEREMPTORY CHALLENGE OF JUROR 16 (VENIRE JUROR 8-8).

A. Overview

The defendant claims that the trial court violated his constitutional rights in preventing his exercise of a peremptory challenge during impanelment. (Def's Brief 22-43) However, his treatment on the historical provenance of peremptory challenges, while scholarly, does little to advance the law, or more importantly, to adequately apply the facts of the instant case to the law in the Commonwealth of Massachusetts which is well settled.

In fact, the issue of the trial court's denial of the defendant's use of a peremptory challenge was not only proper in conclusion but the court's analysis was legally cogent and spot-on. The prosecutor's concern and the court's inquiry into the basis of the defendant's challenge was the only way to prevent what can only be described as a mere sham on the part of the defendant, which if successful would have removed the only apparently African-American member of the venire.

After applying the facts in this case to the state of the law in the Commonwealth, to provide relief under any of the defendant's first five arguments[2] would set the legal advancement concerning jury selection as it relates to racial equality in the Commonwealth back five decades.

B. Standard of Review

This Court should not conclude that the judge abused his discretion by empanelling a juror unless juror prejudice is manifest. Commonwealth v. Seabrooks, 433 Mass. 439, 443 (2001). The defendant has the burden of showing that the jurors were not impartial and must do so by a preponderance of the evidence. Commonwealth v Amirault, 399 Mass. 617, 626 (1987).

C. Summary of Law

The defendant is absolutely entitled to trial by an impartial jury. Commonwealth v. Giusti, 434 Mass. 245, 251 (2001). The Sixth Amendment to the United States Constitution

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[2] The defendant argues in the instant appeal that: 1. The trial court should not have required defense counsel to provide any explanation for his peremptory strike of [Juror 8-8] (Def's Brief 29); 2. That the "pattern requirement" being met by one member of a discrete group should no longer be the rule of law in the Commonwealth (Def's Brief 30-35); 3. That the trial court erred in rejecting counsel's "plausible and persuasive" justification for his peremptory strike (Def's Brief 35-39); 4. The court erred in not striking the juror after "equivocal[ly]" responding to the additional *voir dire* (Def's Brief 39-40; and 5. That the court erred in not allowing the defendant to peremptorily strike the juror after he "disclosed personal experiences" and gave an additional "equivocal" response as to whether he could be fair (Def's Brief 41-43).

guarantees a criminal defendant the right to be tried by an impartial jury. This right is made applicable to the States by the Fourteenth Amendment to the United States Constitution. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). An impartial jury is the cornerstone of a fair trial; "[t]he failure to grant a defendant a fair hearing before an impartial jury violates even minimal standards of due process." Commonwealth v. Susi, 394 Mass. 784, 786 (1985). But defendants must also recognize that they are not entitled to perfection in the trial process. Brown v. United States, 411 U.S. 223, 231-232 (1973), and cases cited. Commonwealth v. Amirault, 399 Mass. 617, 624 (Mass. 1987).

In addition, the trial court is afforded a large degree of discretion in determining whether jurors are impartial, but must be zealous in protecting the rights of an accused person, and the presence of even one juror who is not impartial violates a defendant's rights. Commonwealth v. Long, 419 Mass. 798, 803 (1995).

The Appeals Court in Commonwealth v. Roche, 44 Mass. App. Ct. 372, 374-377 (1998) gives a succinct and well settled digest of the peremptory challenge and its use and/or misuse in the Commonwealth. "While not explicitly guaranteed by the Federal Constitution or the Constitution of this Commonwealth, the purpose of peremptory challenges is to aid in assuring the constitutional right to a fair and impartial jury." Commonwealth

v. Green, 420 Mass. 771, 776, (1995). "Traditionally, the latitude allowed in the exercise of peremptory challenges is wide: 'The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.'" Commonwealth v. Wood, 389 Mass. 552, 560, (1983), quoting from Commonwealth v. Soares, 377 Mass. 461, 484, cert. denied, 444 U.S. 881 (1979). However, the exercise of a peremptory challenge is not without limitation because art. 12 of the Declaration of Rights does not allow "the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community." Commonwealth v. Soares, 377 Mass. at 486. Therefore, the exercise of certain peremptory challenges may be challenged and thus, come under the scrutiny of the trial judge.

In order to "minimize the necessity for lengthy appellate examinations and retrials springing from confusion over jury selection," Commonwealth v. Curtiss, 424 Mass. 78, 81 (1997), the court in Commonwealth v. Soares, supra, established a procedure, later refined in Commonwealth v. Burnett, 418 Mass. 769, 770 (1994), that must be followed in those cases where the exercise of a peremptory challenge is the subject of an objection.

The procedure outlined in Soares is as follows: Peremptory challenges are presumed to be proper but the presumption is rebuttable on a showing that (1) there is a pattern of excluding members of a discrete group and (2) it is likely that individuals are being excluded solely on the basis of their membership within a group. Commonwealth v. Soares, supra, 377 Mass. at 490. Although Soares states that there must be a showing of a pattern, the court later ruled that "the challenge of a single prospective juror within a protected class could, in some circumstances, constitute a prima facie case of impropriety." Commonwealth v. Fryar, 414 Mass. 732, 738 (1993), S.C., 425 Mass. 237 (1997)

"Confronted with a claim that a peremptory challenge is being used to exclude members of a discrete group, the judge must 'determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation.'" Commonwealth v. Curtiss, supra, 424 Mass. at 80-81, quoting from Commonwealth v. Soares, supra, 377 Mass. at 490. Commonwealth v. Rocho, 44 Mass. App. Ct. 372, 374-377 (1998).

D. Application of Law

It is difficult for a party to establish that opposing counsel is basing a peremptory challenge on race. But as this case establishes, it is not impossible. While the defendant

suggests that the Commonwealth lacks standing to object to a peremptory challenge, an officer of the court who sat on their hands after discerning such an issue would join the transgressor were they to ignore the issue - a disservice to the Commonwealth and society.

In light of the fact that the parties were aware that the defendant in this case was Caucasian, the fact he had used racially toxic language to describe the victim on different occasions, and the fact that the victim was African-American - there is little doubt why the defense wanted the only apparent person of color removed from the jury. If successful, this would have effectively converted the jury from a representative cross-section of the community to a homogeneous panel.

As outlined in Soares, while peremptory challenges are presumed to be proper, in this case, the juror (Venire Juror 8-8) sought to be excluded was clearly the member of a discrete group. The prosecutor objected based upon the fact that, other than his race, there was no other apparent reason on the juror's questionnaire that would require or suggest that striking the juror was appropriate. (Tr. 87-88) This was a legitimate *prima facie* showing that the defendant had attempted to use the peremptory challenge inappropriately and the resultant minimal intrusion into counsel's thought process proved to expose the mere sham in great detail.

Once exposed, counsel attempted to justify the challenge offering that his reason for peremptorily striking the juror was because the he was a teacher, he was married to a school administrator, and he had small children - disqualifiers in counsel's opinion. However, the trial court immediately and astutely noted that the defendant was not the only active or retired teacher or parent of young children already sitting on the jury and the defendant had exercised no such challenge on others who may have been educators or parents. The court stated:

> With regard to jurors who are already seated, there are two jurors, 5-6 and 4-3 who are retired teachers, one for a town school system. The other one did not specify what level they taught.
>
> Also with regard to jurors already seated, Juror 3-8 is a teacher who has minor children, ages two and six. In addition, Jurors 1-4, 3-6, 8-2 - while these three jurors are not teachers, they all have very young children, children under the age of 10 at home.
>
> The Court has reviewed the case of Commonwealth versus Curtis (sic), 424 Mass. 78 and has taken the teachings of Curtis into consideration as well. Based on everything before me at the moment, counsel, I must say respectfully that the proffered reason for a challenge is not bona fide, but rather is a mere sham.
>
> (Tr. 88)

The reference to Curtiss was appropriate and adequately addressed the law in the Commonwealth on the issue. Counsel immediately changed tactics and exposed the real motivation for his challenge:

> Counsel - Well sure. The other problem is that I - Mr. Welsh (the prosecutor) has several people coming in from various jails, almost all of whom have claimed

> that my client is a racist. Many of these people are black themselves.
>
> I don't know if they're all from African American descent, but they make the claim that - that my client used the word "nigger" on multiple occasions; that he used the word in connection with the killing of Jason Wells.
>
> There is also a report that says my client refers to black people as "moon pies." I think comments like that certainly are going to perhaps get under the skin of somebody who might be a little bit more sensitive to that issue, particularly where that is their descent.
>
> First of all, we do take exception to the fact that these were said in the first place; but nevertheless, if the jury chooses to believe that they were made by my client, certainly someone who may be sensitive to that because of who they are may tend to be prejudiced by the comments.
>
> (Tr. 88-89)

This observation presupposes bias on the part of Juror 8-8. The extraordinary additional *voir dire* was conducted with the only African-American juror seated at the defendant's continual request. Counsel's continuing effort at exposing some bias on the part of the juror betrays the true motive for his initial peremptory strike - that the juror could not possibly be impartial in light of the evidence that was likely to be introduced at trial, specifically, the use of racially offensive language by the defendant, and the fact that the defendant was Caucasian and the victim African-American. Of course no such concern was expressed towards the other members of the panel.

Once it became clear that the prosecutor's concern as to the basis of the strike was validated, i.e., that in fact the

challenge was related to race, the court could have summarily declined further inquiry. But it did not. Instead, at the insistence of the defense and perhaps out of an abundance of caution, the court conducted additional *voir dire* of the juror, inquiring as to any sensitivities he may have to the use of racial epithets by the defendant et al. Each time he was asked about his ability to be fair and impartial during the *voir dire* process, the juror did not equivocate:

1st exchange

> The Court -- In this matter, sir, the Defendant is white, the deceased was black; the witnesses may be of different races or ethnic heritage. Does this information about race and ethnic heritage affect your ability to be fair and impartial as a juror?
>
> Juror -- No.
>
> (Tr. 82)

2nd exchange

> The Court - And I want to be very sensitive to your situation, (Juror 8-8). If someone in the course of the evidence is accused of making racist statements, would that in any way cloud your ability to sort out issues of credibility? Who is telling the truth, who isn't? And then acting on the evidence as you find it to be?
>
> Juror - Wow.
>
> The Court - Yeah, wow.
>
> Juror - I mean, as a teacher, I've been able to, you know, separate things anyway. So, I think I would be able to do that.
>
> (Tr. 92-93)

3rd exchange

> The Court -- (Juror), thank you again for your patience, sir. When you came in a few moments ago, I spoke about how there may be some testimony from

witnesses that could be taken as racist comments. Want to be more direct in this regard.

In this case, there will be comments attributed to the Defendant by other witnesses that he says things to the effect that, That nigger was going to die anyway or - the exact language, gentlemen?

Prosecutor --I think one of the comments attributed is that, The nigger shot himself.

The Court -- That the nigger shot himself. There may also be comments attributed to the Defendant referencing black people as porch monkeys or --

Counsel -- I believe the expression that will be used is moon pies.

The Court -- Moon pie. Now, to these various comments, the Defendant has disavowed them, has denied them. But still, that type of evidence is apt to come in. And I want to be as sensitive as I can to your concerns and to everyone's concern for a fair trial.
Would you be able to set aside the shock value, if you will, or the shock affect (sic) of such racist statements --

Juror - Uh huh.

The Court -- and proceed to judge this case strictly on its merits and the credibility of the evidence as you determine it to be?

Juror -- I mean, I've been called quite a few of those in my lifetime anyway. So --

The Court -- and you can go forward and be a fair and impartial juror under the circumstances that I have outlined?

Juror -- I would be able to do my best on it.
(Tr. 97-98)

Despite the defendant's current protestations, the juror was unambiguous, unwavering, and unequivocal. The court also made note of the juror's demeanor during questioning:

> The Court - Well, you saw the gentleman's reaction, just as I did now. And I must say, I - from my own eyes, I can't imagine a more straightforward, honest response from a man.
>
> He sort of rocked back on his heels and said, Wow, as he thought about the question and tried to parse it into its various subparts; and then after he thought about it for a minute, he came forward with a very solid, very genuine explanation in my eyes at least, a very well thought out explanation given the limited amount of time the man had to ponder the question.
>
> (Tr. 93-94)

Finally, the judge closed the *voir dire* by noting:

> The Court-- The Court finds there to be no cause for challenge of this juror. The court finds this juror to be fair and impartial. The court finds that the challenge is mere sham. For all of those reasons, the gentleman will be seated as Juror 16.
>
> (Tr. 98)

With regard to the prosecutor's original stated objection, the prosecutor was acting consistently with Soares and its progeny, and he provided cogent and well-reasoned *prima facie* support for his contention that the sole reason for exclusion was the juror's race. Pursuant to Curtiss, the court then "confronted with a claim that a peremptory challenge [was] being used to exclude members of a discrete group, the judge [had to] determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation. Finally, the court was correct in analyzing that under the right circumstances, like the circumstances here, a single peremptory

strike of a member of a discrete group could establish a pattern.

That is precisely what happened in this case. The prosecutor and the trial court prevented what would have been an injustice to all of the people of the Commonwealth. The effort was exposed for what it was - mere sham.

II. THE COURT'S INSTRUCTION ON PRIOR INCONSISTENT STATEMENTS.

The defendant asks this Court to adopt a rule that perjured testimony should be admitted as substantive evidence. In certain limited circumstances, this Court has held that a witness's prior grand jury testimony is admissible as substantive exculpatory evidence. Because it would be too perverse to do otherwise, this Court should not recognize a defendant as having any right to argue that prior perjured statements could be relied upon as exculpatory evidence when it is admitted subsequent to those proceedings that the volunteered information was false. See *generally* Commonwealth v. Callagy, 33 Mass. App. Ct. 85, 89 (Mass. App. Ct. 1992)

In Commonwealth v. Daye, 393 Mass. 55, 72-75 (1984), the Court concluded that prior inconsistent grand jury statements are admissible as probative evidence if specific conditions are met. There must be an opportunity for effective cross-examination of the witness at trial. Id. at 73. If the witness has no memory of the events to which the statement relates, this

requirement of opportunity for meaningful cross-examination is not met. Id. In addition, the statement must clearly be "that of the witness, rather than the interrogator," i.e., the statement must not be coerced and must be more than a "mere confirmation or denial of an allegation by the interrogator," id. at 74-75. Finally, there must be other evidence tending to prove the issue, i.e., corroboration. Id. *See* Commonwealth v. Stewart, 454 Mass. 527, 533 (Mass. 2009)

Assuming *arguendo* that the first two conditions are met, the third requirement - there must be other evidence tending to prove the issue - is clearly not met. Particularly when the witness agrees that they perjured themselves in the earlier statement. Pape did just that. She lied to investigators and under oath before the grand jury. The other witnesses testified that Prunty was not in the hallway or the bathroom when the victim was shot. There was simply no competent corroborative evidence that Pape's earlier statements were a reasonable theory of what happened in the case. "A judge need not charge on a hypothesis not supported by evidence." Commonwealth v. O'Dell, 15 Mass. App. Ct. 257, 261 (1983). *See* Commonwealth v. Walden, 380 Mass. 724, 727 (1980). Commonwealth v. Cook, 419 Mass. 192, 201 (1994)

In this case, the evidence was overwhelming, Daniel Prunty had a motive, he was angry with the victim, he pointed a gun

toward the head of the victim and fired one shot killing Jason Wells. There was no reasonable hypothesis to be drawn from Rebecca Pape's statements to law enforcement or before the grand jury - other than she was a liar trying to protect the person who historically provided her with drugs from being accused of murder. Any suggestion that her statements in that regard were "substantive" fails.

Nothing in the defendant's arguments concerning the jury instructions provides a sufficient reason to order a new trial. The defendant challenges the judge's instruction to the jury in his final charge that prior inconsistent statements were admissible for credibility purposes only, and not as substantive evidence. The defendant's trial counsel made no objection to the instruction despite the issue of credibility being raised by the Commonwealth after the charge was given. (Tr. 1178-1183)

The statements at issue related to Rebecca Pape and her statements to law enforcement, other witnesses, and her appearance before the Barnstable Grand Jury. "Normally prior inconsistent statements are not admissible to establish the truth of the matter asserted.... Where there is no objection, however, and no request for a limiting instruction, the statements may be considered as substantive evidence." Commonwealth v. Luce, 399 Mass. 479, 482 (1987). Further citations omitted. However, at the time the statements were

introduced, the Commonwealth properly did not object to their admission. The Commonwealth also did not request an instruction limiting their purpose to credibility determinations. The conflicts in Pape's testimony served to focus the jury's attention on the reliability of the testimony as to who the shooter was by the Commonwealth's witnesses. The jury had to know that the resolution of where the defendant was when the gun was fired was central to the outcome of the trial, and that the issue had to be decided on all of the testimony. Commonwealth v. Ashley, 427 Mass. 620, 627-628 (1998).

As in Ashley, this Court should discern no harm to the defendant from the judge's instruction. In particular, the instruction could not have had the effect, as the defendant claims, of "remov[ing] valuable and directly exculpatory information - evidence by a percipient witness that the defendant did not and could not have committed the crime" (Def's Brief 46) The jury had ample evidence including testimony regarding Pape's conversations and prior testimony, her extensive trial testimony and a substantial cross-examination to discern which of her statements were truthful and those that were lies. Thus, the jury was instructed properly on the law. Relief should be denied and the convictions should be affirmed.

III. CONSIDERATION OF RELIEF PURSUANT TO G.L. C.278, §33E.

This court has the obligation pursuant to §33E to consider the whole case on the law and the facts. "Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence... or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt." G. L. c. 278, §33E, as amended through St. 1979, c. 346, §2. However, the power is to be used with restraint. Commonwealth v. MacDonald, 371 Mass. 600, 604 (1976). Commonwealth v. Prendergast, 385 Mass. 625, 635 (Mass. 1982)

Since "[t]he jury were correctly instructed on the law and the evidence was sufficient to support their verdict that the defendant was guilty of murder in the first degree," Commonwealth v. Cadwell, 374 Mass. 308, 320 (1978) (Quirico, J., dissenting in part), there is no reason for this Court to exercise its power under §33E. This Court is not a second jury. It does not determine the issue of criminal responsibility. Commonwealth v. Prendergast, 385 Mass. at 638 (1982)

Thus, relief should be denied and the convictions should be affirmed.

CONCLUSION

The Commonwealth respectfully requests that this honorable Court reject all claims of error and discern no basis to grant relief under G.L. c. 278, § 33E. Finally, the Court should affirm all of the defendant's convictions in the matter.

Respectfully submitted,

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